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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HARPREET SINGH,

Petitioner - Appellant,

v.

STEVEN CAMBRA, Director,

Respondent - Appellee.

No. 04-17224

D.C. No. CV-01-03029-SBA

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Saundra B. Armstrong, District Judge, Presiding

Submitted April 6, 2006^{**}
San Francisco, California

Before: NOONAN, SILER^{***}, and BYBEE, Circuit Judges.

Petitioner Harpreet Singh appeals the district court's denial of his petition for habeas relief under 28 U.S.C. § 2254. Singh was convicted in California state

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

^{***} The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

court on charges of assault with a deadly weapon, battery, and misdemeanor vandalism. On direct appeal, and in his habeas petition, Singh contended that the trial judge violated his right to due process by failing to correctly instruct the jury regarding the permissible uses of evidence that Singh had previously been convicted of assault. The California Court of Appeal rejected Singh's claim, applying the standard set forth in *Chapman v. California*, 386 U.S. 18, 24 (1967), and finding that any error that occurred at Singh's trial was "harmless beyond a reasonable doubt." Under the Antiterrorism and Effective Death Penalty Act (AEDPA), we can grant habeas relief only if the California court's decision applied *Chapman* in an "objectively unreasonable" manner. 28 U.S.C. § 2254(d)(1); see *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003).¹

Singh asserts that the state court unreasonably applied *Chapman* because its harmless-error determination was based on a flawed rationale.² We agree with Singh that the California court was incorrect in stating that Singh never contested

¹ Were we to conclude that the state court unreasonably applied *Chapman*, we would then have to determine whether any error that did occur had a "substantial and injurious effect" on the jury's verdict. See *Inthavong v. Lamarque*, 420 F.3d 1055, 1059 (9th Cir. 2005). We do not find it necessary to conduct that analysis in this case, however, because we conclude that the state court's application of *Chapman* was not unreasonable.

² We review the district court's denial of Singh's habeas petition *de novo*. *Smith v. Mitchell*, 437 F.3d 884, 888 (9th Cir. 2006).

his identity as the perpetrator in this case: during both trial and closing argument, Singh's counsel questioned the victim's ability to identify Singh and accused the police of employing an unduly suggestive lineup procedure. That the California court based its harmlessness finding on a questionable premise is not, however, dispositive: "it is the state court's decision, as opposed to its reasoning, that is judged under the 'unreasonable application' standard." *Merced v. McGrath*, 426 F.3d 1076, 1081 (9th Cir. 2005).

We are convinced, as was the district court, that the California court's ultimate conclusion – that any error at Singh's trial was harmless – was not "objectively unreasonable." Singh contends he suffered prejudice because the jury might have used evidence of his prior conviction to conclude that he was guilty of the present offense as well. But the evidence in question was not admitted for this purpose. Instead, it was admitted to show that Singh was a member of a criminal street gang that had committed at least one crime previously – a fact that was an element of the gang-related sentencing enhancement that Singh was charged with. *See* Cal. Penal Code § 186.22(b)(1), (e). To ensure that the prior-crimes evidence was considered for this permissible purpose only, the trial judge explicitly instructed the jury not to consider the evidence "to prove that defendant . . . has a disposition to commit crimes." Absent any indication to the contrary, we must

“assume the jury’s ability to follow limiting instructions,” including the one given here. *United States v. Mayfield*, 189 F.3d 895, 908 (9th Cir. 1999).

The record before us provides additional support for the state court’s ultimate harmlessness determination. First, evidence of Singh’s prior conviction played a minor role at his trial, spanning less than one page of the trial transcript and meriting only a few brief remarks during closing arguments. Moreover, during their closing arguments, counsel for the defendant and for the government both told the jury that they could not use Singh’s prior conviction to infer that he had committed the charged crimes. Finally, we find nothing in the conduct of the trial to indicate that the prosecutor ever, through questioning or argument, suggested or implied to the jury that they could use Singh’s prior conviction to show that he was guilty of the crimes he was now charged with. On this record, we simply cannot say that the California Court of Appeal was “objectively unreasonable” in concluding that any instructional error at Singh’s trial was harmless.

AFFIRMED.